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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX APPLICATION No 355 of 1999

with

ITA Nos.356/99, 357/99, & 358/99

For Approval and Signature:

Hon'ble MR.JUSTICE B.C.PATEL and

Hon'ble MR.JUSTICE P.B.MAJMUDAR

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES
2. To be referred to the Reporter or not? : NO
3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
5. Whether it is to be circulated to the Civil Judge? : NO

THE COMMISSIONER OF INCOME TAX

Versus

TEA KING.

Appearance:

MR MANISH R BHATT for Petitioner

MR SN SOPARKAR for Respondent No. 1

CORAM : MR.JUSTICE B.C.PATEL and

MR.JUSTICE P.B.MAJMUDAR

Date of decision: 27/10/1999

ORAL JUDGEMENT(Per:Patel.J)

#. These applications are preferred by the Commissioner of Income-tax, (CIT for short), Rajkot under section 256(2) of the Income-tax Act 1961 (hereinafter referred

to as the Act) as the applications preferred under section 256(1) of the Act before the Income-tax Appellate Tribunal, Rajkot (hereinafter referred to as the Tribunal) requesting for reference were rejected.

#. The assessee is a registered partnership firm and was carrying on business in Tea. Only after the survey operation carried out by the authorities on 1/2-3-1990 under section 133A of the Act in the business premises of the assessee, the assessee filed returns of income for A.Y. 1985-86 to 1989-90 on 10.10.1990. 1989-90. Since the books of accounts were not audited the Assessing Officer levied penalty under section 271B of the Act for all the years i.e. 1986-87 to 1989-90. The Appellate Authority confirmed the penalty so far as the Assessment Year 1985-86 is concerned on the ground that the assessee failed to get the account books audited within the stipulated period. However, in the subsequent years the order passed by the Assessing Officer levying penalty was set aside on the ground that since the books of account for the preceding assessment years were not ready and were not upto date and therefore it was not possible for the assessee to get the account books audited for the subsequent years though the same were written.

#. The matter was carried in appeal by the Assessing Officer as well as by the assessee. Before us, the assessee has not preferred any application against the penalty imposed on it for the assessment year 1985-86. So far as the revenue is concerned it has preferred applications for making a reference and the same being rejected, has preferred these applications before this court inter alia contending that there was no plausible explanation by the assessee, not to get its account books audited for the subsequent years as well. The questions raised by the revenue are as under:

"1. Whether the appellate Tribunal is right in law and on facts in levying the penalty u/s 271-B for A.Y. 1986-87 to 89-90 on the ground that the books of accounts for A.Y. 1985-86 were not completed and hence, it was not possible to complete the audit for these 4 years, when the Tribunal itself, while deciding the quantum appeals for the same years held that the books of accounts for these years were complete at the time of survey action ?

"2. Whether on the facts and circumstances of the case, when the assessee itself did not carry forward the balances from books of accounts of

A.Y.1985-86 to those of later years, was the ITAT right in holding that the assessee was prevented by reasonable cause from completing the books of accounts of A.Ys. 1986-87 to 89-90 and getting them audited within the time permitted u/s 44AB of the IT Act ?"

Mr.Naik learned counsel appearing for the revenue submitted that in view of section 44AB of the Act it is compulsory to get the books of account audited, if the assessee has a turn over as prescribed in this section. He submitted that in the instant case the assessee failed to get his books of account audited. He failed to submit his return in time and thus the Assessing Officer was justified in invoking section 271B of the Act. He submitted that there was no reasonable cause or explanation by the assessee for not getting the books of account audited. Therefore, not only the CIT (Appeals) but the Tribunal both have committed errors. We have to bear in mind that these are the findings of fact.

#. No doubt section 44AB of the Act lays down that every person carrying on business shall, if his total sales, turn over or gross receipts as the case may be, in business exceed forty lakh rupees in any previous year or carrying on profession, shall if his gross receipts in profession exceed ten lakh rupees shall get the accounts of such previous year audited by an accountant before the specified date and obtain before the date the report of such audit in the prescribed form.

#. It is required to be noted that in this section, as originally enacted, absence of reasonable cause was a necessary condition for imposing penalty. Present section 271B reads as under:

"...the Assessing Officer may direct that such person shall pay, by way of penalty, a sum equal to one-half per cent of the total sales, turnover or gross receipts, as the case may be in business or of the gross receipts in profession, in such previous year or years or a sum of one hundred thousand rupees, which ever is less.

#. Section 273B indicates that no penalty shall be imposed on the person or assessee as the case may for any failure as referred to in the said section if he proves that there was reasonable cause for the said failure. Thus reading of section 273B of the Act, it is clear that onus is on the assessee. Looking to the provisions of

section 271B of the Act where the word "may" is used and as per the provisions contained in section 273B whether the explanation offered by the assessee can be said to be the reasonable explanation or not is the only aspect required to be considered. The CIT (Appeals) has found that for the first year there was no reasonable explanation, but for the subsequent years, there was existence of reasonable cause. Can it be said that an error is committed? more particularly when the Tribunal in its elaborate judgment has dealt with the aspect.

#. The CIT (Appeals) was of the view that unless the books of previous years are complete in all respects, it is not possible to get the books audited for subsequent years though the same may be ready. He opined in para 6 of the order as under:

"As the books of accounts for AY 85-86 were not made upto date and were not audited, it was not possible to have the audit made for the other four years. For making audit the opening balance, pending stock and number of other details are required but in the absence of the completion of books for the first year it was impossible to have the books for the first year audited. It was impossible to have the books finalised for later years and to have them audited. I therefore, hold that under the circumstances it was not possible for the assessee to have the audit made as per the provisions of section 44AB for the later years. The penalty for these years is therefore, not correct in law and the penalties for these years are therefore, deleted."

#. The Tribunal in its order (at page 62 of the paper book) has reproduced para 4 of its judgment (in appeal) in the case of the assessee.

"It is an undisputed fact that the assessee firm was maintaining regular books of accounts, vouchers, cash book, ledger, inward register, purchase and sales register, bills etc. and the same were examined by the Assessing Officer. Quantitative details were prepared on the basis of purchase and sale register which were before the Assessing Officer. Thus, this is a case where in fact the assessee was maintaining books of account day to day in its regular course of business. Thus it is clear that the assessee was maintaining books of accounts, no doubt the same

were not audited as required under the law."

#. What is required to be noted as submitted by Mr. Soparkar is that the discretion is required to be exercised and when reasonable cause has been pleaded and if the same has been accepted, then the question of reference does not arise. He submitted that there are concurrent findings of facts. Looking to the facts and circumstances as narrated hereinabove, it cannot be said that any question of law arises in the matters. This is a case where the assessee could not comply with the provisions because there was no audit for the preceding year. For subsequent years though the books of accounts were ready, the same could not be audited. The Tribunal and CIT(Appeals) found that the audit could not be completed because the books of accounts for the first year were not ready.

##. Exercise of a discretion on the facts established is a question . Explanation rendered by the assessee coupled with the findings of facts such as books of accounts were ready being accepted as sufficient for exercising discretion in favour of the assessee by the CIT as confirmed by the Tribunal, in our opinion does not raise any question of law.

##. In our view , on appreciation of the evidence, when the finding recorded by the first appellate authority is confirmed by the Tribunal, it cannot be said that any substantial question of law arises in these matters and therefore, we dismiss these applications. Rule discharged in all the matters. No order as to costs.

Copy of this order may be kept in other matters.